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McGeorge Law Review

Volume 37
Issue 4 *Symposium: Sentencing Guideline Law and Practice in a Post-Booker World*

Article 7

1-1-2006

Challenging Untested Facts at Sentencing: The Applicability of Crawford at Sentencing after Booker

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[Cross-examination is] the greatest legal engine ever invented for the discovery of truth.[1]

The right of confrontation is worth the cost. It is, after all, not a "technicality" serving some extraneous purpose . . . . It bears directly on and significantly advances the truth-seeking function of sentencing hearings.[2]

I. INTRODUCTION

Darrell Beaulieu and his two brothers were charged with conspiracy to manufacture drugs.[3] Beaulieu pled guilty, but his brothers took the case to trial. During the brothers' trial, multiple witnesses described the conspiracy and identified Beaulieu as the leader. Following his brothers' trial, Beaulieu was sentenced under the United States Sentencing Guidelines (USSG or "Guidelines"). Based on testimony from the brothers' trial, the district court increased Beaulieu's sentence under USSG section 3B1.1(a) for being an "organizer or leader" of a criminal activity.

Beaulieu argued on appeal that the district court should not have relied on this testimony without giving him the opportunity to cross-examine the witnesses who identified him as the leader of the conspiracy, as required by the Sixth Amendment. The Tenth Circuit disagreed, holding that "the constitutional requirements mandated in a criminal trial as to confrontation and cross-examination do not apply at non-capital sentencing proceedings."[4]

United States v. Beaulieu illustrates the rule that has become the law in virtually every circuit in the country: the Confrontation Clause does not apply at sentencing.[5] Recently, however, two Supreme Court cases have prompted courts to reconsider this rule. In *Crawford v. Washington*,[6] the Supreme Court fundamentally changed its Confrontation Clause analysis, adopting an approach that gives the clause much greater meaning at sentencing. In *United States v. Booker*,[7] the motivation for this symposium, the Court held that the mandatory application of the Guidelines requires Sixth Amendment protections, which presumably includes confrontation rights.

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1. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 32 (Chadbourn rev. ed., 1974).

2. United States v. Wise, 976 F.2d 393, 412 (8th Cir. 1992) (Arnold, J., dissenting).

3. United States v. Beaulieu, 893 F.2d 1177, 1178-79 (10th Cir. 1990).

4. *Id.* at 1180 (citations omitted).

5. *See, e.g.*, United States v. Francis, 39 F.3d 803, 810 (7th Cir. 1994); United States v. Petty, 982 F.2d 1365, 1367 (9th Cir. 1993), *amended on other grounds*, 992 F.2d 1015 (9th Cir. 1993); United States v. Badger, 983 F.2d 1443, 1459 (7th Cir. 1993); *Wise*, 976 F.2d at 393 (en banc), *rev'g* United States v. Fortier, 911 F.2d 100 (8th Cir. 1990); United States v. Tardiff, 969 F.2d 1283, 1287 (1st Cir. 1992); United States v. Silverman, 976 F.2d 1502, 1510 (1992) (en banc), *rev'g* 945 F.2d 1337 (6th Cir. 1991); United States v. Johnson, 935 F.2d 47, 50 (4th Cir. 1991); United States v. Kikumura, 918 F.2d 1084, 1102 (3d Cir. 1990); United States v. Marshall, 910 F.2d 1241, 1244 (5th Cir. 1990); *Beaulieu*, 893 F.2d at 1180.

6. 541 U.S. 36 (2004).

7. 543 U.S. 220 (2005).

Nevertheless, every court to consider whether the Confrontation Clause applies at sentencing in light of these two cases has rejected the possibility, relying uncritically on their pre-*Booker* Confrontation Clause cases.[8] But this precedent is misguided and should not be followed for several reasons. First, it ignores the text of the Sixth Amendment, which guarantees a right to confront adverse witnesses, not just at trial, but in all criminal *prosecutions*. Second, it relies on the premise that the Sentencing Reform Act (SRA) did not fundamentally change federal sentencing so as to require Sixth Amendment protections, a premise that *Booker* squarely rejects. Third, it is based on an understanding of the Confrontation Clause that *Crawford* has rejected. Finally, it is based on now-rejected sentencing policy.

In light of these defects, federal courts should reconsider their precedent, hold that the Confrontation Clause applies at post-*Booker* sentencing under the SRA, and give defendants the benefits of *Crawford* at sentencing. In reaching that conclusion, this article first lays out a brief chronology of federal sentencing law and policy, showing how federal courts came to deny confrontation rights at sentencing. Part II demonstrates why this precedent should not be followed. Part III explains why the Confrontation Clause ought to apply at sentencing as a matter of constitutional interpretation and as a consequence of the SRA. Part IV discusses how *Crawford* might reasonably be applied at sentencing and the practical implications of such protection.

II. THE CHRONOLOGY OF SENTENCING

In order to understand how defendants' confrontation rights are implicated at sentencing, it is necessary to understand how sentencing has evolved over the years. Federal sentencing law and policy in this country can be grouped into three main eras. First is the era of indeterminate sentencing, which was motivated largely by a rehabilitative ideal and prevailed from the beginning of this country through 1987. Second is the era of mandatory guideline sentencing, characterized by a determinate sentencing scheme that limited judicial discretion at sentencing from 1987 through 2005. Finally is the post-*Booker* era of sentencing that has prompted this symposium, which I will call the era of guided sentencing.

8. *See, e.g.*, United States v. Luciano, 414 F.3d 174 (1st Cir. 2005); United States v. Martinez, 413 F.3d 239 (2d Cir. 2005); United States v. Rigdon, 2005 WL 1664454 (5th Cir. July 18, 2005); United States v. Stone, 432 F.3d 651 (6th Cir. 2005); United States v. Roche, 415 F.3d 614 (7th Cir. 2005); United States v. Brown, 430 F.3d 942 (8th Cir. 2005); United States v. McGuffin, 2005 WL 1526109 (10th Cir. June 29, 2005); United States v. Cantellano, 430 F.3d 1142 (11th Cir. 2005); United States v. Gray, 362 F. Supp. 2d 714 (S.D. W. Va. 2005).

A. *Indeterminate Sentencing and the Rehabilitative Ideal*

At the time of this country's founding, criminal justice was undergoing a transformation from a determinate sentencing model to an indeterminate model. In the years preceding the founding, sentencing was largely determinate, meaning a person convicted of a particular crime was given a particular sentence, often some form of corporal punishment or a specific fine.[9] "A defendant knew from the face of the charging instrument precisely what sentence she would receive if convicted."[10]

Starting in the late eighteenth century, this model of punishment began to be replaced by an indeterminate model wherein judges had discretion to impose any sentence within a legislatively defined range.[11] The impetus for this shift was the desire to individualize sentencing and the recognition that "death and corporal punishment were disproportionate penalties with little deterrent effect."[12] Under the indeterminate model, sentencing judges could base the sentence on both the nature of the crime and the unique situation of the defendant. Under the former model, it would not make sense to discuss a confrontation right at sentencing because there would be no factfinding at sentencing and, therefore, no witnesses to confront. The more difficult question is whether a defendant had a right to confront adverse witnesses at sentencing in an indeterminate scheme.

To answer this question, it is necessary to keep in mind both the procedures and the policies that developed. Procedurally, judges imposed sentences with little or no guidance from a jury.[13] Blackstone writes that the court would exercise its discretion based upon "the aggravations or otherwise of the offense, the quality and condition of the parties, and from innumerable other circumstances,"[14] but he does not specify if there were any limits on what sources a judge could consider in determining this evidence. He does claim that punishment within an indeterminate range was not wholly arbitrary, but the only limit on judicial discretion that he cites is the prohibition on "excessive fines" and "cruel and unusual punishments."[15]

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9. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 376–77 (4th ed. 1967); Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 696–97 (2005).

10. Klein, *supra* note 9, at 696. Blackstone writes that once a person had been convicted, "the court [had to] . . . pronounce that judgment, which the law has annexed to the crime, and which has been constantly mentioned, together with the crime itself." BLACKSTONE, *supra* note 9, at 376.

11. Klein, *supra* note 9, at 697. Professor Klein notes that "of the twenty-two federal crimes enacted by the First Congress in 1790, only six required a determinate sentence of hanging." *Id.* Blackstone also acknowledges the increasing use of indeterminate sentences in England. BLACKSTONE, *supra* note 9, at 378–79.

12. Klein, *supra* note 9, at 697.

13. *Id.*

14. BLACKSTONE, *supra* note 9, at 378.

15. *Id.*

Two hundred years later, the United States Supreme Court in *Williams v. New York*[16] described how sentencing in this indeterminate era generally worked. Typically, a judge would "consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities."[17] Much of this information would be gathered by probation officers "who ha[d] been trained not to prosecute but to aid offenders."[18] In conducting this investigation, probation officers were permitted to gather information "outside the courtroom from persons whom a defendant has not been permitted to confront or cross-examine."[19] Often, probation officers would then communicate their findings to the judge "in private and ex parte."[20]

Prepared with this information the court would proceed to sentencing. One judge described the sentencing procedure as follows:

> The old informal system of indeterminate sentencing was not adversary in nature. . . . There were no rules allocating burdens of proof between the parties concerning the existence of sentencing facts, nor were there rules concerning disclosure of the judge's sources of information. Most important of all, the old system did not require the judge to find facts or to base his sentence on the existence or nonexistence of a particular fact or group of facts. The old nonadversary process did not require factfinding because district judges had an absolute and unreviewable discretion, so long as the sentence imposed did not exceed the statutory maximum for the offense. Sentencing was an intuitive process.[21]

One of the motivations for this system was the widely held notion that courts could "treat" sick offenders. This rehabilitative ideal arose in the late nineteenth century,[22] and the *Williams* Court explained its relevance at sentencing. Under "prevalent modern philosophy of penology," the Court explained, "punishment should fit the offender and not merely the crime."[23]

> Retribution is no longer the dominant objective of criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.

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16. 337 U.S. 241 (1949).
17. *Id.* at 245.
18. *Id.* at 249.
19. *Id.* at 245.
20. United States v. Silverman, 976 F.2d 1502, 1524 (6th Cir. 1992) (Merritt, C.J., dissenting).
21. *Id.*
22. Klein, *supra* note 9, at 698.
23. *Williams*, 337 U.S. at 247.

> Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes. For indeterminate sentences and probation have resulted in an increase in the discretionary powers exercised in fixing punishments. In general, these modern changes have not resulted in making the lot of offenders harder. On the contrary, a strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship. This belief to a large extent has been justified.[24]

In this context, the Court considered the constraints a judge faced when "obtain[ing] information to guide him in the imposition of sentence upon an already convicted defendant."[25] In *Williams*, the defendant had been convicted of first-degree murder by a jury. The jury recommended a life sentence, but the judge sentenced the defendant to death, relying in part on a report submitted by the probation officer, which claimed the defendant was responsible for a number of prior crimes for which he had not been convicted.

The Court did not look to the Confrontation Clause to decide whether the trial court erred in relying on this evidence, presumably because the Confrontation Clause had not yet been incorporated against the states.[26] Instead, the Court looked only to the limited confrontation right of the Due Process Clause, which required that "no person shall be tried and convicted of an offense unless he is . . . afforded an opportunity to examine adverse witnesses."[27] Although such strictures were necessary to establish guilt, the Court reasoned that "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment."[28]

Enlightened by a rehabilitative model of punishment, the Court concluded that such flexibility was necessary to ensure that punishment "fit the offender and not merely the crime"[29] and held that the Due Process Clause did not "command that courts throughout the Nation abandon their age-old practice of seeking

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24. *Id.* The last line of this passage underscores how unreliable *Williams'* sentencing policy is for modern sentencing law. It was not too long after *Williams* that the Supreme Court recognized that empirical studies actually suggested the rehabilitative effort was a failure. *See* Mistretta v. United States, 488 U.S. 361, 363 (1989) (citing NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 24–43 (1974)).

25. *Williams*, 337 U.S. at 244.

26. This right would not be incorporated against the states until 1965 in *Pointer v. Texas*, 380 U.S. 400 (1965).

27. *Williams*, 337 U.S. at 245 (citations omitted).

28. *Id.* at 246.

29. *Id.* at 247.

information from out-of-court sources to guide their judgment toward a more enlightened and just sentence."[30] Because reliance on presentence reports rife with hearsay was integral to the rehabilitative effort, the court decided to allow it: "To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation."[31]

Eighteen years later, the Court revisited *Williams* in *Specht v. Patterson*,[32] holding that due process required confrontation in sentencing proceedings that effectively created "a separate criminal proceeding."[33] In *Specht*, the Court reviewed a Colorado recidivist statute that authorized the state to increase the sentence for a convicted sex offender based on the judge's conclusion at sentencing that the offender "constitute[d] a threat of bodily harm to members of the public, or [was] an habitual offender and mentally ill."[34] Prior to sentencing, the defendant in *Specht* was examined by a psychiatrist and a report was given to the trial judge.[35] The court did not hold a hearing on the applicability of the enhancement, so the defendant was unable to cross-examine the doctor about his findings.[36]

The Court distinguished this sentence from that in *Williams* because it was based on a "new finding of fact that was not an ingredient of the offense charged."[37] As such, the enhancement created a "new charge leading to criminal punishment"[38] that entitled the defendant "to a full judicial hearing before the magnified sentence was imposed,"[39] including the right to confront witnesses against him.[40] Although the circuits would later discuss *Williams* and *Specht* to hold that the Confrontation Clause did not apply at sentencing under the SRA, it is significant that both of these cases discussed confrontation as a due process right rather than looking to the text of the Confrontation Clause.

In this sentencing climate, Congress in 1970 codified the broad latitude that federal judges enjoyed when finding facts for an indeterminate sentence: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an

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30. *Id.* at 250–51; *see also* Williams v. Oklahoma, 358 U.S. 576 (1959) (holding that *due process* does not require that evidence at sentencing be subject to cross-examination).

31. Williams v. New York, 337 U.S. 241, 250 (1949).

32. 386 U.S. 605 (1967).

33. *Id.* at 609 (quoting United States ex rel. Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966)).

34. *Id.* at 607 (quoting COLO. REV. STAT. ANN. §§ 39-19-1 to 10 (West 1963)).

35. *Id.* at 608.

36. *Id.*

37. *Id.* (citation omitted).

38. *Id.* at 610.

39. *Id.* at 609 (quoting United States ex rel. Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966)).

40. *Id.* at 610.

appropriate sentence."[41] Furthermore, the Federal Rules of Evidence expressly did not apply at sentencing,[42] so the fact that testimony was hearsay did not render it inadmissible at sentencing. Still, these authorities did not preclude the possibility that evidence might be unconstitutional.[43]

Only one circuit court considered whether the Confrontation Clause applied at an indeterminate sentencing.[44] In *United States v. Fatico*,[45] the Second Circuit held it did not. Before the court was a well-reasoned decision by Judge Weinstein, in which he rejected hearsay from a confidential source who claimed the defendants had mob connections. In doing so, Judge Weinstein concluded that the hearsay violated both the Due Process and Confrontation Clauses of the Constitution.[46]

The latter concerns us here. After discussing the general significance of the Confrontation Clause, Judge Weinstein noted that "[s]entencing is a critical, often the most critical, stage of the criminal trial process" but that "[n]either the history of the Sixth Amendment nor the case law delineate the reach of the Amendment's protections for criminal defendants."[47] Citing Justice Harlan's concurrence in *California v. Green*,[48] Judge Weinstein concluded that

> the core of the Confrontation Clause is the requirement that the prosecution produce a witness when he is available to testify. "There is no reason in fairness why a State should not, as long as it retains a traditional adversarial trial, produce a witness and afford the accused an opportunity to cross-examine him when he can be made available."[49]

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41. 18 U.S.C. § 3661 (1970).

42. FED. R. EVID. 1101(d)(3).

43. *See* United States v. Fatico, 579 F.2d 707, 711 (2d Cir. 1978) (recognizing that, notwithstanding these authorities, admissibility of evidence at sentencing may be limited by the Due Process or Confrontation Clauses); *Rules of Evidence for the United States Courts and Magistrates*, 56 F.R.D. 183, 351 (1972) ("The rule [excepting applicability of evidence rules to sentencing proceedings] is not intended as an expression as to when due process or other constitutional provisions may require an evidentiary hearing.").

44. *Fatico*, 579 F.2d 707; United States v. Fischer, 381 F.2d 509, 511 (2d Cir. 1967) (stating that the Supreme Court has held "that the constitutional guaranty of [the Sixth Amendment confrontation right] has no application at the sentencing stage of a criminal prosecution"). This is not to say that the Second Circuit was the only circuit pre-SRA to discuss a confrontation *right* at sentencing. Indeed, many courts discussed a defendant's right to confront adverse witnesses at sentencing, but they considered only the requirements of the Due Process Clause and did not address the applicability of the Confrontation Clause. *See, e.g.*, United States v. Ammirato, 670 F.2d 552, 556-57 (5th Cir. 1982) (rejecting due process challenge under *Williams*).

45. 579 F.2d 707; *see also* United States v. Orozco-Prada, 732 F.2d 1076, 1085 (2d Cir. 1984) (rejecting a Confrontation Clause challenge to the use of hearsay testimony at sentencing and citing *Williams* and *Fatico*).

46. United States v. Fatico, 441 F. Supp. 1285 (E.D.N.Y. 1977), *rev'd* 579 F.2d 707 (2d Cir. 1978). About this fact, Judge Weinstein noted, "[m]embership in an organized crime family and other ties to professional criminal groups are material facts that would and should influence the court's sentencing decision." *Id.* at 1288.

47. *Id.* at 1296.

48. 399 U.S. 149 (1970).

49. *Fatico*, 441 F. Supp. at 1297 (quoting *Green*, 399 U.S. at 187 (Harlan, J., concurring)).

Accordingly, he concluded:

> [T]he Confrontation Clause requires at least this: the government cannot affirmatively prevent the defendant from examining under oath a declarant when the declarant's knowledge is offered by the government (1) at a critical stage of the criminal process, (2) as to crucial information that (3) directly affects a substantial liberty interest of the defendant.[50]

Because denying access "to an informant whose declarations are introduced as evidence" was the same as "affirmatively prevent[ing] the defendant from examining him," failure to call the confidential informant at sentencing violated the defendants' rights under the Confrontation Clause.[51]

The Second Circuit, however, was not persuaded. Its more thorough analytical efforts were devoted to dismissing Judge Weinstein's Due Process Clause holding. Then, having done so, the court acknowledged, "it is not clear whether, or to what extent, the Confrontation Clause of the Sixth Amendment is implicated at sentencing . . . ."[52] Although the court quoted the text of the Sixth Amendment,[53] it said nothing about the text's significance, finding it "unnecessary to differentiate between the requirements of the Due Process Clause of the Fifth Amendment and the Confrontation Clause of the Sixth."[54] It reasoned, "[b]oth constitutional safeguards, as applied in this context, are directed at ensuring the fairness of criminal proceedings by defining the situations in which confrontation by cross-examination must be afforded a defendant."[55] Thus, the "admission of an unidentified informant's corroborated declarations in a sentencing proceeding *where there is good cause for not disclosing his identity* is not barred by the Confrontation Clause."[56]

Other than this brief discussion in *Fatico*, no other circuit in the indeterminate era considered whether the Confrontation Clause applied at sentencing independent of the Due Process Clause. Accordingly, until the passage of the SRA, judges had broad discretion to impose any sentence within the statutory range on the basis of virtually any facts that were before them.

B. Mandatory Guideline Sentencing

While the era of indeterminate, rehabilitative sentences gave judges broad discretion to "help" defendants by tailoring sentences to their individual circumstances, by the early 1970s, many began to question the utility of

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50. *Id.*
51. *Id.*
52. *Fatico*, 579 F.2d at 713, *rev'g* 441 F. Supp. 1285 (E.D.N.Y. 1977).
53. *Id.* at 713 n.15.
54. *Id.* at 714.
55. *Id.*
56. *Id.* (emphasis added).

indeterminate sentencing and its rehabilitative aims.[57] The most troubling observation was that defendants in different courts were receiving different sentences for similar crimes. Furthermore, it was unclear whether sentencing practices were having any rehabilitative effect. This observation was particularly troubling when seen in the context of a parole system that gave early release to many defendants who seemed unrehabilitated.

As a result, Congress passed the Sentencing Reform Act of 1984 (SRA), which marked a dramatic shift in sentencing policy and instituted significant substantive and procedural reforms. Reacting to the failed psychology of the sixties and seventies, Congress all but rejected the rehabilitative ideal, focusing instead on retribution and deterrence.[58] The legislative history of the SRA stated:

> Recent studies suggest that [the rehabilitative] approach has failed, and most sentencing judges as well as the Parole Commission agree that the rehabilitation model is not an appropriate basis for sentencing decisions. We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular person has been rehabilitated.[59]

Furthermore, courts were admonished that "imprisonment is not an appropriate means of promoting correction and rehabilitation."[60]

Substantively, the biggest change was the creation of a mandatory guideline system that limited judicial discretion within the statutory range. Congress created an administrative agency, the United States Sentencing Commission ("Commission"), which was charged with promulgating a comprehensive set of sentencing "guidelines."[61] By statute[62] and by judicial interpretation,[63] sentencing judges were required to sentence a convicted defendant within the applicable guideline range. Although a judge had some discretion to "depart" from the guideline range, that discretion was limited by appellate courts.[64]

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57. Klein, *supra* note 9, at 699.

58. *See* 18 U.S.C.A. § 3553(a)(2) (West 2000 & Supp. 2005) (requiring courts to consider retribution, deterrence, incapacitation, and rehabilitation); *see also* United States v. Wise, 976 F.2d 393, 399 (8th Cir. 1992) (noting that rehabilitation was subordinated to the end of the list).

59. S. REP. No. 98-225, at 38 (1983).

60. 18 U.S.C.A. § 3582 (West 2000).

61. 28 U.S.C.A. § 994 (West 2001).

62. 18 U.S.C.A. § 3553(b)(1) (West 2000 & Supp. 2005), *stricken by* United States v. Booker, 543 U.S. 200, 259 (2005).

63. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 367 (1989) (noting that Congress created a "mandatory-guideline system" that "makes the Sentencing Commission's guidelines binding on the courts").

64. *See Booker*, 543 U.S. at 234 (noting that judicial discretion to depart from the guideline range was so limited that the availability of departures did not render the Guidelines advisory).

A significant aspect of the mandatory guidelines was the notion of "real offense" sentencing.[65] In promulgating the Guidelines, the Commission had to decide

> whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense with which the defendant was charged and of which he was convicted ("charge offense" sentencing).[66]

Concluding that the existing system was, "in a sense, a real offense system," the Commission initially created a real offense system that would have required courts to use "quadratic roots and other mathematical operations" in imposing sentences.[67] In the end, the Commission "moved closer to a 'charge offense' system" that "has a number of real elements."[68] As then-Judge Breyer described it:

> A sentencing guideline system must have some real elements, but not so many that it becomes unwieldy or procedurally unfair. The Commission's system makes such a compromise. It looks to the offense *charged* to secure the "base offense level." It then modifies that level in light of several "real" aggravating or mitigating factors, (listed under each separate crime), several "real" general adjustments ("role in the offense," for example) and several "real" characteristics of the offender, related to past record.[69]

Another proponent of the guideline system stated:

> The relevant-conduct principle and cross-references between guidelines often work to ensure that the offense level is based on the actual offense behavior. For offenses like drug trafficking, theft, fraud, or tax evasion, conduct from uncharged or dismissed counts is often aggregated through application of the relevant conduct guideline section, 1B1.3(a)(2) . . . .[70]

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65. It is unclear to what extent "real offense" sentencing was an innovation of the Guidelines. The Guidelines claim it was not an innovation at all. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A4(a) (1987); *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which they Rest*, 17 HOFSTRA L. REV. 1, 11 (1988) (arguing that the "real offense system" preceded the Guidelines). Others, however, suggest that if the concept itself was not an innovation, the undue emphasis of it certainly was. *See* United States v. Silverman, 976 F.2d 1502, 1524–25 (6th Cir. 1992) (Merritt, C.J., dissenting).

66. U.S. SENTENCING GUIDELINES MANUAL § 1A4(a) (1987).

67. *Id.*

68. *Id.*

69. Breyer, *supra* note 65, at 11–12.

70. Paul J. Hofer, *Plea Agreements, Judicial Discretion, and Sentencing Goals*, *in* FEDERAL JUDICIAL CENTER, FJC DIRECTIONS, No. 3, May 1992 at 3 (on file with the *McGeorge Law Review*).

Accordingly, under the Guidelines, courts could consider all of a defendant's "relevant conduct," which included "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant."[71] As a consequence, the Guidelines directed judges to consider facts far beyond the elements of the charged offense.

Not only did a judge *consider* these facts, the facts had specific, measurable effects on a defendant's sentence. Furthermore, by cross-referencing guidelines for other crimes, a defendant convicted of one crime could be sentenced as if he had been convicted of a much more serious crime.[72]

To facilitate this comprehensive sentencing calculus, Congress also enacted extensive sentencing procedures. As before, a probation officer would "make a presentence investigation of a defendant" and report the results of that investigation to the court prior to sentencing.[73] Presentence reports ("PSR") would continue to identify relevant sentencing information for the judges and they would also calculate the applicable guideline range under the Guidelines.[74] The probation officer would then provide a preliminary report to both the defendant and the government at least thirty-five days before sentencing,[75] during which time both parties would have the opportunity to object to information contained therein.[76] Once the parties had raised and responded to any objections, the probation officer would submit a final PSR to the court at least ten days before sentencing.[77] Frequently, these reports would "contain hearsay information from confidential and unidentified sources."[78]

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71. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(A) (1987).

72. The most notable example of this is the frequent cross reference to the homicide guidelines in cases where a crime leads to the death of a victim. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL §§ 2E2.1(C)(1) (extortion); 2K1.4(c)(1) (arson); 2K2.1(c)(1)(B) (simple possession of a weapon). Interestingly, Blackstone appears to disagree with this practice, at least in the context of perjury, and claims it is contrary to the English mode of punishment. In his discussion of the penalties for perjury, he notes the French practice of making perjury a capital offense where the perjury led to the death of an innocent victim. Even under ancient English law, "[w]here indeed the death of an innocent person has actually been the consequence of such wilful perjury, it falls within the guilt of deliberate murder, and deserves an equal punishment." BLACKSTONE, *supra* note 9, at 138–39. However, under modern law,

> the mere attempt to destroy life by other means not being capital, there is no reason than an attempt by perjury should; much less that this crime should in *all* judicial cases be punished with death. For to multiply capital punishments lessens their effect, when applied to crimes of the deepest dye; and, detestable as perjury is, it is not by any means to be compared with some other offences, for which only death can be inflicted.

Id. at 139.

73. 18 U.S.C.A. § 3552(a) (West 2000); FED. R. CRIM. P. 32(c)(1)(A). The Act also authorized courts to request an examination of the defendant prior to sentencing. 18 U.S.C.A. § 3552(b)-(c).

74. FED. R. CRIM. P. 32(d).

75. *Id.* 32(e)(2).

76. *Id.* 32(f).

77. 18 U.S.C.A. § 3552(d); FED. R. CRIM. P. 32(g). Interestingly, the rule requires disclosure only seven days prior to sentencing.

78. United States v. Silverman, 976 F.2d 1502, 1510 (6th Cir. 1992).

Perhaps the most significant innovation of the SRA was the requirement that courts resolve objections to the PSR at an adversarial sentencing hearing.[79] At these hearings, courts would be required to resolve any factual disputes that would affect the sentence.[80] The court also would have to give the defendant and his attorney an opportunity to "speak or present any information to mitigate the sentence" and provide a similar opportunity to the government.[81] Either party would be permitted to call witnesses.[82] In short, the SRA turned federal sentencing hearings into adversarial proceedings where judges heard testimony to resolve hotly contested facts that had predictable consequences for a defendant's sentence.

Given these procedural changes, it should be no surprise that defendants again asked courts to let them cross-examine the people whose stories would so dramatically affect their punishments, but this time they argued under the Confrontation Clause. For the first time courts considered that the Confrontation Clause might apply at sentencing, but in the end, every circuit rejected this view.[83] The rationale for these decisions will be discussed more fully below, but a few observations can be made here. The most troubling observation is that although a few cases cited the text of the Sixth Amendment, no court seriously wrestled with its meaning. Another surprising characteristic was that the courts agreed that the changes implemented by the SRA had no constitutionally significant effect on sentencing, a conclusion that is clearly erroneous in light of *Booker*. Furthermore, courts did not seem troubled by the inapplicability of the Confrontation Clause because of the established precedent that evidence at sentencing must be reliable, coupled with the established policy that judges needed a wide range of information at sentencing. Although these views can be readily critiqued in hindsight, at the time, they commanded the unanimous assent of the federal judiciary.[84]

C. Guided Sentencing

Of course, much of this changed on January 12, 2005. On that day, the Supreme Court issued its landmark decision in *United States v. Booker*, holding that the SRA changed federal sentencing in such a way that the Sixth Amendment right to a jury necessarily applied at sentencing. The main precedent

79. FED. R. CRIM. P. 32(i)(3).

80. *Id.* 32(i)(3); *Silverman*, 976 F.2d at 1511.

81. FED. R. CRIM. P. 32(i)(4).

82. *Id.* 32(i)(2).

83. *See supra* note 5 and accompanying text.

84. These views were unanimous in the sense that a majority in every circuit to reach the question rejected it. Two circuits, however, did so en banc after first taking a contrary view. United States v. Wise, 923 F.2d 86, *rev'd by* 976 F.2d 393 (8th Cir. 1992) (en banc); *Silverman*, 945 F.2d 1337 (6th Cir. 1991), *rev'd by* 976 F.2d 1502, 1510 (1992) (en banc). The panel opinions in these cases and the dissenting opinions of Chief Judge Merritt of the Sixth Circuit and Chief Judge Arnold of the Eighth express the better-reasoned view.

for this holding was a prior case, *Apprendi v. New Jersey*,[85] where the Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[86] Because *Apprendi* dealt with a statutory enhancement, circuit courts rejected the claim that *Apprendi* applied to the Guidelines.[87]

Four years after *Apprendi*, the Supreme Court did, in fact, apply *Apprendi* to a sentencing scheme in *Blakely v. Washington*.[88] There, the Court considered the constitutionality of Washington's sentencing scheme that allowed a sentencing judge to enhance a defendant's sentence based on judge-found facts that were neither alleged in the indictment nor admitted in the guilty plea. The Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[89] The Court reasoned that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[90] Based on this reasoning, the Court struck down the Washington law that opened the door to an enhanced sentence based on judicial factfinding.[91]

The obvious implication of *Blakely* was that the federal sentencing scheme must also be unconstitutional,[92] and in *Booker*, the Supreme Court held that it was. In a five to four majority, the same Justices that joined together in *Blakely* (Justices Stevens, Scalia, Souter, Thomas, and Ginsburg) held in *Booker* that the mandatory application of the Guidelines violated the Sixth Amendment right to a jury trial.[93] Almost everyone anticipated this result: "The real debate in *Booker* was not so much whether the Court would find a Sixth Amendment violation, but rather what ought to be the proper *remedy* for such a violation."[94] But, no one predicted the remedy.[95]

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85. 530 U.S. 466 (2000).

86. *Id.* at 490.

87. *See, e.g.*, United States v. Wainright, 351 F.3d 816, 824 (8th Cir. 2003); *United States v. Garcia*, 252 F.3d 838, 843 (6th Cir. 2001); United States v. Sullivan, 255 F.3d 1256, 1264–65 (10th Cir. 2001).

88. 542 U.S. 296 (2004).

89. *Id.* at 303.

90. *Id.* at 303–04.

91. *Id.* at 305.

92. *See id.* at 323 (O'Connor, J., dissenting) (noting that the majority opinion "casts constitutional doubt" over the Guidelines); United States v. Croxford, 324 F. Supp. 2d 1230, 1238–42 (D. Utah 2004) (striking the Guidelines as unconstitutional).

93. United States v. Booker, 543 U.S. 220, 233 (2005).

94. Timothy Lynch, *One Cheer for* United States v. Booker, CATO SUP. CT. REV. 2004–2005 215, 224 (2005).

95. Most commentators expected that the Court would adopt one of the three remedies suggested in Judge Paul G. Cassell's opinion in *United States v. Croxford*: (1) convene sentencing juries, (2) hold only the enhancements unconstitutional, or (3) hold the Guidelines "unconstitutional in their entirety." 324 F. Supp. 2d at 1242. No commentator or judge predicted the remedy the Court would ultimately impose.

With the Court unanimous that the root of the problem was the mandatory application of the Guidelines,[96] the other four Justices (Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer), joined by Justice Ginsburg, held that the proper remedy would be to strike those portions of the SRA that made the Guidelines binding at sentencing: (1) 18 U.S.C. § 3553(b)(1), which required sentencing judges to stay within the guideline range, and (2) 18 U.S.C. § 3742(e), which authorized circuit courts to review sentencing decisions de novo.[97]

One interesting aspect of this remedy opinion was its severability analysis, which left the remainder of the SRA intact.[98] As a result, sentencing courts are guided by the factors set forth in 18 U.S.C. § 3553(a), one of which is the Guidelines.[99] District courts should still consult the Guidelines, but they are not be bound by guideline determinations, and they should impose a sentence consistent with all of the factors in § 3553(a).[100] Because sentences are largely discretionary, circuit courts should review sentences only for reasonableness.[101]

Booker said very little about what procedures a district court should follow at sentencing, but a few observations can be made. Most significantly, because the various provisions that made sentencing unconstitutional under the SRA can be severed, the Guidelines and other procedures are left in place. As a result, not much has changed at this point: "[A] year later, as revealed by numerous district and circuit court opinions and cumulative post-*Booker* data, the conversion of the guidelines from mandatory to advisory has not significantly altered the central features of federal sentencing."[102] The Guidelines themselves have not been modified, other than the ordinary, annual amendments;[103] only their application has been impacted. Now, district courts should consider the Guidelines but may impose any sentence within the legislative range, subject to the considerations in 18 U.S.C. § 3553.[104]

As for procedure, nothing has changed. Federal Rule of Criminal Procedure 32 is still intact, which means that probation officers must still do a presentence investigation and compile a PSR.[105] Because the district court must consider the Guidelines, the PSR must still include a guideline calculation.[106] Also, district courts must still resolve all factual disputes that are relevant to the guideline

96. *See Booker*, 543 U.S. at 233 ("If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment.").

97. *Id.* at 245, 259.

98. *Id.* at 246–49.

99. *Id.* at 259–60.

100. *Id.*

101. *Id.* at 260–62.

102. Douglas Berman, *Same Old Sentencing*, LEGAL TIMES, Dec. 26, 2005, at 35 (on file with the *McGeorge Law Review*).

103. Surprisingly, the most recent Guidelines do not even mention *Booker*.

104. *Booker*, 543 U.S. at 259–60.

105. FED. R. CRIM. P. 32(c)-(d).

106. *Id.* 32(d)(1).

calculation,[107] and as before, the forum to do this is an adversarial hearing.[108] Most significantly, one by one, circuit courts are imposing the same de novo standard of review for guideline calculations and holding that sentences will be reversed for guideline calculation error without regard to whether the sentence was reasonable.[109]

With this procedural backdrop, we return to the central issue of this article—whether the Confrontation Clause applies at sentencing—and introduce *Crawford v. Washington*, another landmark Supreme Court case issued just a few months before *Blakely*.[110] In *Crawford*, the Supreme Court overruled the longstanding rule in *Ohio v. Roberts*[111] that out-of-court statements must fall within an established hearsay exception or be otherwise reliable in order to survive a Confrontation Clause challenge.[112] Instead, the Court adopted a rule that "testimonial hearsay" could only be admitted if (1) the defendant had a prior opportunity to cross-examine the declarant and (2) the declarant was unavailable to testify at trial.[113]

In response to both *Crawford* and *Booker*, circuit courts are now considering whether the Confrontation Clause, as interpreted in *Crawford*, applies at sentencing. So far, the circuits have unanimously held it does not.[114] For the most part, courts are uncritically returning to the Confrontation Clause cases from the mandatory guideline era, pointing out that since *Crawford* dealt with a *trial* right, nothing in *Crawford* requires them to revisit their precedent that the Confrontation Clause did not apply at sentencing.

In contrast to these decisions, one district court concluded that *Crawford* was relevant to the question but then relied on *Booker* to conclude that the Confrontation Clause still did not apply. In *United States v. Gray*,[115] the court acknowledged that *Crawford*" has breathed new life into the debate."[116] However, while an argument could be made that "the Guidelines closely simulate

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107. *Id.* 32(i)(3)(B).

108. *Id.* 2(i)(4)(A).

109. *See, e.g.*, United States v. Bothun, 424 F.3d 582, 586 (7th Cir. 2005) ("Post-*Booker* we continue to review the court's application of the Sentencing Guidelines *de novo* and its factual findings for clear error."); United States v. Weisser, 417 F.3d 336, 346 (2d Cir. 2005) ("When reviewing a district court's application of the Guidelines in the post-*Booker* era, we examine questions of law *de novo* and issues of fact for clear error."); United States v. Serrata, 425 F.3d 886, 906 (10th Cir. 2005) ("We retain 'the same jurisdiction to review guidelines sentences as [we] had before the Supreme Court's decision in *Booker*.' In considering the application of the sentencing guidelines, we review the district court's factual findings for clear error, and its legal determinations de novo." (quoting United States v. Sierra-Castillo, 405 F.3d 932, 936 n.2 (10th Cir. 2005))).

110. Perhaps the most notable feature of *Crawford* and *Blakely* is not their temporal and geographic proximity but the fact that they were argued by Jeffrey L. Fisher of Davis Wright Tremaine LLP in Seattle, Washington, a thirty-three-year-old commercial lawyer making his first appearances before the Supreme Court.

111. 448 U.S. 56 (1980).

112. *Id.* at 66.

113. Crawford v. Washington, 541 U.S. at 36, 68-69 (2004).

114. *See supra* note 8 and accompanying text.

115. United States v. Gray, 362 F. Supp. 2d 714 (S.D. W. Va. 2005).

116. *Id.* at 724.

trials so as to require the same procedural protections," such arguments "have been significantly undermined by the *Booker* remedy that makes the Guidelines advisory."[117] Accordingly, the court decided that any Sixth Amendment problem was remedied by *Booker*.

Thus, it appears that courts must be persuaded of two significant issues before they will apply *Crawford* at sentencing. First, they must be persuaded to revisit their own precedents on the basis that either they were misguided from the start or they were implicitly overruled by *Crawford* and *Booker*. Second, they must be persuaded that the Confrontation Clause continues to apply at sentencing, notwithstanding the remedy in *Booker*. I discuss each issue in turn.

III. THE CONFRONTATION QUESTION IS NOT SETTLED

Despite the fact that circuit precedent from the mandatory guideline era is unanimous, several reasons exist for reconsidering it. First, it fails to seriously engage the text of the Sixth Amendment. Second, the SRA fundamentally changed the federal criminal system, requiring confrontation. Third, it is based on an erroneous understanding of the Confrontation Clause. Finally, it is based on now-rejected sentencing policy.[118]

A. Courts Ignored the Sixth Amendment

The first problem with the pre-*Booker* precedent is that courts did not seriously engage the text of the Sixth Amendment in holding that the Confrontation Clause did not apply at sentencing. The Confrontation Clause states that "*[i]n all criminal prosecutions*, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[119] Accordingly, the starting point ought to be whether sentencing is a criminal prosecution for purposes of the Sixth Amendment.[120]

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117. *Id.* at 725.

118. In the early 1990s, several law review articles raised many of the points I raise here, arguing that the SRA and USSG required application of the Confrontation Clause at sentencing. *See, e.g.*, Edward R. Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses be Applied?*, 22 CAP. U. L. REV. 1 (1993); Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880 (1992); David A. Hoffman, *The Federal Sentencing Guidelines and Confrontation Rights*, 42 DUKE. L.J. 382 (1992); Matthew E. Johnson, *Criminal Constitutional Law—Eighth Circuit Applies the Confrontation Clause at a Sentencing Hearing*—United States v. Fortier, *911 F.2d 100 (8th Cir. 1990)*, 17 WM. MITCHELL L. REV. 829 (1991).

119. U.S. CONST. amend. VI (emphasis added).

120. United States v. Wise, 976 F.2d 393, 406 (8th Cir. 1992) (Arnold, C.J., dissenting) ("The interpretation of any written document, including the Constitution, should begin with its words, though it will rarely end there."); United States v. Petty, 982 F.2d 1365, 1370 (9th Cir. 1993) (Noonan, J., dissenting) ("An initial question is whether sentencing is part of a criminal proceeding.").

Surprisingly, the Supreme Court has never addressed this issue[121] and the circuits have only half-heartedly done so. The Third Circuit dismissed this issue in a single line: "As a textual matter, the sixth amendment, which refers to 'criminal prosecutions,' *arguably* applies only at trial."[122] Without any further discussion, the court noted but declined to resolve the most critical dispute on this issue. If it was wrong, and the Sixth Amendment applied more broadly than just at trial, then *the rest of the opinion would be wrong too.* Like a runner who misses third base, the holding cannot stand until courts return to touch the bag. Until this critical issue is resolved, any other reasons not to apply the Confrontation Clause at sentencing are immaterial.

At first blush, it appears the Seventh Circuit was resolving this precise issue when it stated, "[a] sentencing hearing, however, is not a 'criminal prosecution' within the meaning of the Sixth Amendment because its sole purpose is to determine only the appropriate punishment for the offense, not the accused's guilt."[123] However, closer scrutiny makes clear that the Seventh Circuit also failed to seriously engage the text. As for its stated reason, while it is true that a sentencing hearing is not technically about guilt or innocence, it is certainly about raising and resolving factual disputes about what a defendant really did. Offense conduct beyond the scope of the elements of the charged offense is highly relevant at sentencing, particularly under the SRA.[124] In a sense, sentencing *is* about determining guilt because it allows a judge to assess a defendant's blameworthiness on a scale of moral culpability. The fact that two defendants are guilty of the same offense does not mean that they deserve the same punishment.[125] Even in an indeterminate sentencing scheme, testimony at sentencing about a defendant's role in the offense, the weapons he used, or his purpose for committing the crime, will impact the sentence he receives.[126] The

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121. *See* United States v. Kikumura, 918 F.2d 1084, 1103 n.19 (3d Cir. 1900) (inviting the Supreme Court to resolve the Confrontation Clause question); *Gray*, 362 F. Supp. 2d at 725. *But see* Mitchell v. United States, 526 U.S. 314, 338 (1999) (Scalia, J. dissenting) (citing *Williams v. New York*, 337 U.S. 241 (1948), for the proposition that the Confrontation Clause does not apply at sentencing). Significantly, the Court in *Mitchell* considered whether sentencing is part of a "criminal case" for purposes of the Fifth Amendment, concluding that "a sentencing hearing is part of the criminal case." *Id.* at 327 (majority opinion).

122. *Kikumura*, 918 F.2d at 1102 (emphasis added).

123. *United States v. Francis*, 39 F.3d 803, 810 (7th Cir. 1994).

124. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.3 (defining relevant conduct).

125. Judge Becker made this point in *Kikumura*:

> [I]t is self-evident that an internationally trained terrorist who is bent on murdering scores of innocent civilians should be sentenced far more severely than a duly licensed explosives merchant who knows that one of his customers intends to blow up an abandoned warehouse in order to commit insurance fraud, even if each of these defendants is convicted under 18 U.S.C. § 844(d) for transporting explosives "with the knowledge or intent that [they] will be used to kill . . . any individual or unlawfully to . . . destroy any building."

Kikumura, 918 F.2d at 1099.

126. For example, Judge Weinstein, when sentencing alleged mobsters during the indeterminate era stated, "[m]embership in an organized crime family and other ties to professional criminal groups are material facts that would and should influence the court's sentencing decision." United States v. Fatico, 441 F. Supp.

Seventh Circuit offers no satisfactory explanation why the formal distinction between trial and sentencing would make only the former a prosecution.

The Seventh Circuit's cited authority also fails to support its conclusion that sentencing is not a "prosecution" under the Sixth Amendment. The only case cited for this proposition is *United States v. Wise*,[127] an en banc decision from the Eighth Circuit. While it is true that *Wise* also held the Confrontation Clause inapplicable at sentencing, it did not consider whether a sentencing hearing was a "prosecution" under the Sixth Amendment. It did not even quote the Sixth Amendment:[128] "Just as increasing a defendant's sentence on the basis of relevant conduct does not constitute a conviction for a separate offense, so also establishing a defendant's role in the offense on which he has been convicted does not constitute a criminal prosecution within the meaning of the Confrontation Clause."[129] If the Eighth Circuit intended this language to elucidate the Sixth Amendment, it is odd that it would do so without quoting the amendment or otherwise tying the claim to the constitutional text.

Even assuming that this language was intended as a discussion of the Sixth Amendment, we see that the analysis fails. While the second clause of this statement may be true in the abstract, it is not true when considered in the context of modern sentencing. It is probably true that a hearing convened solely for the purpose of considering a person's role in the commission of some crime (i.e., was he a "leader/organizer") is not a criminal prosecution because that fact is not, by itself, criminal. The problem is that abstract fact resolution is not the sole purpose of sentencing hearings. Sentencing hearings under the SRA certainly are intended to resolve disputed facts, such as a person's role in the commission of a crime, in the context of a criminal prosecution. The purpose of such aggravating facts, however, is to *enhance* a defendant's sentence, whether by operation of some guideline provision or as an act of judicial discretion, and the resolution of factual disputes has important consequences for the prosecution of a defendant. It simply does not make sense to say that these factual disputes are not part of the prosecution.

One final example of circuit courts not addressing the text of the Sixth Amendment is the Tenth Circuit's analysis in *United States v. Beaulieu*.[130] There the court stated, "[t]he Supreme Court has made clear that the constitutional requirements mandated in a criminal trial as to confrontation and cross-examination do not apply at non-capital sentencing proceedings."[131] Reading this statement, we would expect the cited authorities to point us to some Supreme Court exposition of the significance of the Sixth Amendment, but as noted above,

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1285, 1288 (E.D.N.Y. 1977).

127. 976 F.2d 393, 400–01 (8th Cir. 1992) (en banc).

128. *Id.* at 408 (Arnold, C.J., dissenting).

129. *Id.* at 400–01. Part II.C explores in greater detail why the first part of this statement is incorrect.

130. 893 F.2d 1177 (10th Cir. 1990).

131. *Id.* at 1180 (footnote omitted).

the Supreme Court has never addressed this issue. The cited authority is simply another Tenth Circuit case,[132] which in turn relied on *Williams* for the proposition that "[i]t seems clear from these decisions that the requirements mandated in a criminal trial as to confrontation and cross-examination are not applicable at sentencing proceedings. The right to confrontation is basically a trial right."[133] But *Williams* said nothing about the Confrontation Clause. By reading earlier authorities as if they had resolved this constitutional issue, the pre-*Booker* courts have perpetuated the critical failure. Because no court has grappled with the meaning of the Sixth Amendment, circuit courts should welcome the opportunity to resolve this issue in the wake of *Crawford* and *Booker*.

B. *The SRA Fundamentally Changed the Federal Criminal System and Implicated the Confrontation Clause*

Besides the courts' failure to engage the Sixth Amendment, they missed the mark when it came to deciding the implications of the SRA. Following the passage of the SRA, courts were willing to consider whether the SRA made federal sentencings so trial-like that confrontation was required. Every court to reach this issue concluded it did not.[134] These authorities are indisputably wrong in light of *Booker*.

The main Supreme Court authority that opened the door to this argument was *Specht v. Patterson*.[135] As discussed above,[136] this case discussed a statutory sentencing enhancement based on a judicially found fact. Because the enhancement created a "new charge leading to criminal punishment,"[137] the defendant "was entitled

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132. *Id.* (citing United States v. Sunrhodes, 831 F.2d 1537, 1543 (10th Cir. 1987)).

133. *Sunrhodes*, 831 F.2d at 1543. For the proposition that confrontation is not required at sentencing, the court also cites *Williams v. Oklahoma*, 358 U.S. 576 (1959), which was a due process case that said nothing about the Confrontation Clause. For the proposition that "[t]he right to confrontation is basically a trial right," the court also cited *Mancusi v. Stubbs*, 408 U.S. 204, 211 (1972), which in turn relied on *Barber v. Page*, 390 U.S. 719 (1968). *Barber* is the source of this language, but should not be relied on as a final word on whether the Confrontation Clause applies at sentencing. At issue in *Barber* was whether the government could introduce testimony from an unavailable witness who testified at the preliminary hearing. The defendant chose not to cross-examine him at the hearing, and the government argued that the defendant had waived his confrontation right at trial by choosing not to cross-examine him at that time. The Court ultimately found a confrontation violation on a rationale that looks a lot like *Crawford*. More than anything, the point of this language was that since the incentives at a preliminary hearing are different from at trial, the Court would have found a Confrontation Clause violation even if the defendant had chosen to cross-examine him then. It is in this context that the Court stated: "The right to confrontation is basically a trial right." *Barber* 390 U.S. at 725. Because the applicability of the right at sentencing was not before the court, it cannot be read so broadly as to exclude that possibility.

134. *See, e.g.*, United States v. Petty, 982 F.2d 1365, 1368 (9th Cir. 1993) ("[A]ll seven [circuits to consider this question] have held that the confrontation Clause does not apply at sentencing, notwithstanding the enactment of the Guidelines.").

135. 386 U.S. 605 (1967).

136. *See supra* notes 32-40 and accompanying text.

137. *Specht*, 386 U.S. at 610.

to a full judicial hearing before the magnified sentence was imposed,"[138] including the right to confront witnesses against him.[139] In light of *Specht*, courts acknowledged that "where the sentencing phase constitutes 'a separate criminal proceeding' . . . due process requires that a defendant have the opportunity to confront and cross-examine witnesses."[140] Accordingly, the circuits seemed willing to require confrontation at sentencing if "the application of the Guidelines has so changed the sentencing phase that it now constitutes a separate criminal proceeding to which the right of confrontation applies."[141]

Nevertheless, all courts to reach this issue rejected it. The Eighth Circuit in *Wise* discussed several changes wrought by the SRA and concluded that none of them so fundamentally changed sentencing that confrontation was required.[142] Its most notable observation was that although "the protections of the right of confrontation apply at the guilt phase, . . . it does not follow that the same protections apply at sentencing simply because facts proved at sentencing may increase a defendant's sentence."[143] Oddly, the court did acknowledge that "in certain instances a sentence may so overwhelm or be so disproportionate to the punishment that would otherwise be imposed absent the sentencing factors mandated by the Guidelines that due process concerns must be addressed."[144] The court continued, "[t]his may occur where a defendant's sentence is so greatly increased as a result of considering relevant conduct that the conduct essentially becomes an element of the offense for which the defendant is being punished."[145]

Similarly, the Sixth Circuit held that changes under the SRA did not require confrontation: "While a number of considerations have changed, we are of the view that the permissible methods of informing the sentencing judge and the need for information in fashioning sentences in light of the constitutional rights of defendants at sentencing have not essentially changed."[146] The Seventh Circuit also wrote that "even with the dramatic changes in the sentencing process brought about by the Sentencing Guidelines, the pre-Guidelines policy of allowing sentencing courts to obtain all relevant sentencing information without the strictures of the right of confrontation remains intact."[147] Noting that pre-SRA cases had consistently allowed hearsay at sentencing, the Tenth Circuit likewise stated, "[w]e find nothing in the Guidelines to suggest that a different rule now applies."[148]

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138. *Id.* at 609 (quoting United States ex rel. Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966)).

139. *Id.* at 610.

140. *See, e.g.*, United States v. Wise, 976 F.2d 393, 398 (8th Cir. 1992) (quoting *Specht*, 386 U.S. at 609).

141. *Id.*

142. *Id.* at 398–401.

143. *Id.* at 400.

144. *Id.* at 401.

145. *Id.*

146. United States v. Silverman, 976 F.2d 1502, 1508 (6th Cir. 1992).

147. United States v. Francis, 39 F.3d 803, 810 (7th Cir. 1994).

148. United States v. Beaulieu, 893 F.2d 1177, 1179 (10th Cir. 1990).

The problem with this reasoning is that *Booker* makes clear that the SRA as originally enacted *did* turn sentencing hearings into mini trials that required full Sixth Amendment protection. The Court acknowledged that sentencing courts have typically enjoyed broad discretion in imposing sentences within a statutorily defined range.[149] However, because the SRA made the Guidelines mandatory, judicial discretion was limited to within the guideline ranges.[150] As such, the top of the guideline range became the "statutory maximum" for *Apprendi* purposes, and facts found at sentencing could increase that statutory maximum without any constitutional protections.[151] Accordingly, the SRA unconstitutionally deprived defendants of the right to have a jury find these facts.[152] Because the Sixth Amendment right to a jury trial was required under the SRA as enacted, it follows a fortiori that the Confrontation Clause was also required under the SRA.

Applying this analysis in hindsight, it is surprising that courts did not recognize sooner that sentencing enhancements under the SRA, like the one in *Specht*, were based on "a new finding of fact that was not an ingredient of the offense charged."[153] In light of *Booker*, there can be no doubt that the SRA turned federal sentencing into the type of hearing where the "full panoply" of trial rights was required, "including the right to confront and cross-examine the witnesses against him."[154] Because the cases that held the Confrontation Clause inapplicable under the SRA reached exactly the opposite conclusion, *Booker* demands that courts reexamine this precedent. Even if they ultimately conclude, like the district court in *Gray*, that the *Booker* remedy cured any Confrontation Clause defects in the SRA,[155] they should consider the issue in the full light of *Booker* and not rely uncritically on arguably overruled precedent.

C. Crawford *Clarified the Meaning of the Confrontation Clause*

Another reason for courts to reexamine this question is that they relied on an interpretation of the Confrontation Clause that has now been repudiated. Two aspects of *Crawford* have implications at sentencing. First, *Crawford* made clear that the Confrontation Clause was intended to do more than just guarantee the reliability of testimony. Second, a corollary to the first point, hearsay rules are irrelevant as to whether out-of-court statements can constitutionally be admitted.

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149. United States v. Booker, 543 U.S. 220, 233 (2005) (citing Williams v. New York, 337 U.S. 241 (1949)).

150. *Id.*

151. *Id.* at 235–36.

152. *Id.* at 244.

153. Specht v. Patterson, 386 U.S. 605, 608 (1967) (citation omitted).

154. *Id.* at 609–10 (quoting United States ex rel. Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966)).

155. United States v. Gray, 362 F. Supp. 2d 714, 725 (S.D. W. Va. 2005).

1. Reliability Is Irrelevant to the Confrontation Clause

Prior to *Crawford*, the touchstone of the Confrontation Clause was reliability. Under *Ohio v. Roberts*, a statement by an unavailable witness was "admissible only if it [bore] adequate 'indicia of reliability'" because it fell "within a firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."[156]

In light of this understanding of the Confrontation Clause, it is not surprising that courts decided it did not apply at sentencing. Although sentencing courts could generally consider hearsay, due process required that hearsay "have some minimal indicium of reliability," otherwise it could not be considered without confrontation.[157] Citing *Roberts*, the Third Circuit noted that "the confrontation clause imposes a higher constitutional standard of admissibility [at trial] than [due process does] at sentencing,"[158] but given the emphasis on reliability in both places, it is hard to see the distinction. Still, apparently recognizing the unfairness of relying on unchallenged testimony, the Third Circuit concluded that "due process requires more than a '*minimal* indicium of reliability'" and imposed a "heightened [due process] test" that required a sentencing court to "examine the totality of the circumstances, including other corroborating evidence, and determine whether the hearsay declarations are reasonably trustworthy."[159]

However, because the stated concern for both the Due Process Clause and the Confrontation Clause was reliability, it was hard to see much difference between the two standards. The Eighth Circuit stated that the reliability standard "fulfills the Confrontation Clauses' basic purpose of promoting the integrity of the factfinding process."[160] Similarly, pre-SRA the Second Circuit concluded it was "unnecessary to differentiate between the requirements of the Due Process Clause of the Fifth Amendment and the Confrontation Clause of the Sixth," because at sentencing "[b]oth constitutional safeguards . . . are directed at ensuring the fairness of criminal proceedings by defining the situations in which confrontation by cross-examination must be afforded a defendant."[161] Because due process required a showing of reliability, it was easy for courts to conclude that due process reliability standards were enough.

However, *Crawford* makes clear that the Confrontation Clause was intended to do more than just protect defendants from being punished based on unreliable evidence. The Supreme Court stated that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure,

156. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

157. United States v. Kikumura, 918 F.2d 1084, 1102 (3d Cir. 1990) (quoting United States v. Baylin, 696 F.2d 1030, 1040 (3d Cir. 1982)); *see also* United States v. Wise, 976 F.2d 393, 402-03 (8th Cir. 1992).

158. *Kikumura*, 918 F.2d at 1102.

159. *Id.* at 1103 (emphasis added).

160. *Wise*, 976 F.2d at 402.

161. United States v. Fatico, 579 F.2d 707, 714 (2d Cir. 1978).

and particularly its use of *ex parte* examinations as evidence against the accused."[162] Notably, this statement of purpose says nothing to imply that the evil was limited to trial settings. The evil was the use of *ex parte* examinations against the accused. Certainly, offering evidence at sentencing with the purpose of increasing a defendant's sentence is "us[ing] . . . evidence against the accused." Moreover, it would hardly seem fair to allow Congress to circumvent this protection by making certain facts "sentencing facts" rather than actual elements of the crime.

2. *Hearsay Rules Are Irrelevant Under the Confrontation Clause*

Another problem with the pre-*Crawford* approach to confrontation was that it was tied to hearsay. Under *Roberts*, out-of-court testimony did not violate the confrontation clause if it fell within a well-established hearsay exception.[163] Because the Federal Rules of Evidence did not apply at sentencing, hearsay was admissible at sentencing,[164] so it did not make much sense to reinstate a hearsay analysis at sentencing via the Confrontation Clause.[165]

Crawford also repudiates the notion that interpretation of the Confrontation Clause is tied to hearsay rules. The court stated:

> [W]e once again reject the view that . . . its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.' Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.[166]

The Court continued:

> This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.[167]

Thus, while it is true that sentencing judges are not constrained by the rules of evidence, the inapplicability of the rules is no reason to allow the government

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162. Crawford v. Washington, 541 U.S. 36, 50 (2004).
163. Ohio v. Roberts, 448 U.S. 56, 66 (1980).
164. *See* FED. R. EVID. 1101(d)(3).
165. *See, e.g.*, United States v. Beaulieu, 893 F.2d 1177, 1181 (10th Cir. 1990).
166. *Crawford*, 541 U.S. at 50–51 (quoting 3 WIGMORE, *supra* note 1, § 1397, at 101) (citation omitted).
167. *Id.* at 51.

to penalize defendants based on *ex parte* examinations that the Constitution forbids. Nor is the fact that such examinations may be deemed "reliable" by pre-*Crawford* standards justification to rely on them. Because *Crawford* "marks a fundamental shift in the Supreme Court's Confrontation Clause jurisprudence,"[168] courts should certainly revisit their prior holdings that stem, in part, from the former, mistaken understanding of this right.[169]

D. The SRA Changed the Policy Basis for Rejecting Confrontation

A final reason to reconsider the pre-*Booker* cases is that they dismiss the reality that modern sentencing policy has also shifted fundamentally since *Williams*. At the core of the rule to allow hearsay at sentencing was the rehabilitative ideal, the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime."[170] Because reliance on presentence reports rife with hearsay was integral to the rehabilitative effort, the court decided to allow it: "To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation."[171]

The problem with this foundation is that with the passage of the SRA, rehabilitation was rejected as the primary aim at sentencing. Indeed, the "impetus" for the SRA was "the consensus that developed in the 1970s that the hoped-for rehabilitation of offenders was simply not taking place."[172] Contrary to the Supreme Court's earlier view in *Williams*, it ultimately conceded that "[r]ehabilitation as a sound penological theory came to be questioned and, in any event, was regarded by some as an unattainable goal for most cases."[173] Thus, although rehabilitation remained a consideration, it was subordinate to the other theories of punishment.[174]

The problem with this theoretical shift in sentencing is that it undermines the reliability of precedent that traces its roots to *Williams*: "Case law is based on reason, and if the reason justifying the result of a case ceases to exist, the case loses its authority."[175] While it is true the SRA did not change the need for judges to rely on a

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168. United States v. Solomon, 399 F.3d 1231, 1237 n.2 (10th Cir. 2005).

169. *See* United States v. Gray, 362 F. Supp. 2d 714, 724 (S.D. W. Va. 2005) ("*Crawford* . . . has breathed new life into the debate.").

170. Williams v. New York, 337 U.S. 241, 247 (1949).

171. *Id.* at 250.

172. United States v. Wilson, 355 F. Supp. 2d 1259, 1282 (D. Utah 2005).

173. Mistretta v. United States, 488 U.S. 361, 365 (1989) (citing NORVAL, *supra* note 24, at 24-43; FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981)); *see also* Robert Martinson, *What Works?-Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22, 25 (1974) ("Rehabilitation, tested empirically, is a failure; 'nothing works' as a prison reform program to reduce recidivism.").

174. *See* United States v. Wise, 976 F.2d 393, 399 (8th Cir. 1992) (citing 18 U.S.C. § 3553(a)(2) (2000)).

175. *Id.* at 408 (Arnold, C.J., dissenting).

broad range of information at sentencing,[176] the theoretical shift produced a legal shift that gave identified, aggravating facts specific, measurable significance at sentencing. Under the new policy, sentencing is no longer a vague attempt to "treat" a sick member of society. Now, the focus is on measured proportionality between the crime and the punishment and mathematical uniformity between apparently similar cases.[177] One judge noted:

> The *Williams* opinion makes clear that the decision is intended to allow the "modern" theories of "indeterminate," "individualized," "discretionary" intuitive sentencing designed to "rehabilitate" the offender to be put into practice without constitutional limitations that could undermine the experiment. The Court contrasted the new, more "humane" system of rehabilitation with the previous harsh system of determinate sentencing based on retribution and deterrence. The "new" experimental system . . . is now the "old" system—characterized, it is said, by unconscionable "disparity."[178]

Given these policy shifts, courts ought to ask whether their precedents adequately take into account current attitudes about the theories of punishment.

IV. POST-*BOOKER* CONFRONTATION CLAUSE RIGHTS AT SENTENCING

A. *The Sixth Amendment Requires Confrontation at Sentencing*

Assuming that courts are persuaded to revisit this issue, the question becomes how to handle it. Contrary to the approach in previous cases, the starting point for this analysis is the text of the Sixth Amendment.[179] The Sixth Amendment states: "*In all criminal prosecutions*, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[180] The fundamental issue ought to be "whether sentencings are 'criminal prosecutions' for Sixth Amendment purposes,"[181] but as noted above, no federal court has ever directly addressed this question.

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176. *Id.* at 399 ("[Post-SRA,] the sentencing judge still considers information not strictly relevant to a defendant's guilt and needs to conduct a broad inquiry to obtain that information.").

177. *See id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 1A3); *see also* 18 U.S.C. § 3553(a)(6) (2000) (making uniformity one of the legislative objectives of sentencing).

178. United States v. Silverman, 976 F.2d 1502, 1526 (6th Cir. 1992) (Merritt, C.J., dissenting).

179. *See, e.g.*, *Wise*, 976 F.2d at 406 (Arnold, C.J., dissenting) ("The interpretation of any written document, including the Constitution, should begin with it words, though it will rarely end there."); United States v. Petty, 982 F.2d 1365, 1370 (9th Cir. 1993) (Noonan, J., dissenting) ("An initial question is whether sentencing is part of a criminal prosecution.").

180. U.S. CONST. amend. VI (emphasis added).

181. United States v. Gray, 362 F. Supp. 2d 714, 725 (S.D. W. Va. 2005); *Wise*, 976 F.2d at 406 (Arnold, C.J., dissenting).

1. Structure of the Sixth Amendment

The best clue for solving this puzzle is found in the structure of the Sixth Amendment itself. The full text of the Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.[182]

Note that the introductory clause, "in all criminal prosecutions," prefaces all of the rights listed in this amendment. Had the drafters intended to limit these rights to trials, they would not have needed to explicitly limit the first set of rights—speed and an impartial jury—to trials. The fact that some of the rights in the Sixth Amendment are limited to trials and others are not suggests that only those rights that are expressly limited to trials should be limited to trials. The other rights ought to apply at every stage of a criminal prosecution.

This analysis helps explain the observation by circuit courts that some but not all of the Sixth Amendment rights are limited to trial. In rejecting the Confrontation Clause at sentencing, courts would cite the various components of the Sixth Amendment and then say, "[m]any of these rights, applicable at trial, are not applicable to the sentencing process," without explaining why the right to counsel applied at sentencing when the right to a jury did not.[183] The answer is in the structure of the Sixth Amendment. Unlike the jury right, which is expressly a trial right, the right to counsel applies in all *prosecutions*, so it is natural that the right to counsel would apply at sentencing when the right to a jury does not. Indeed, the Supreme Court has held as much: "The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process,"[184] one of which is sentencing.[185] As such, courts have long held that defendants have a right to counsel at sentencing.[186]

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182. U.S. CONST. amend. VI.

183. *See, e.g.*, *Silverman*, 976 F.2d at 1511.

184. Iowa v. Tovar, 541 U.S. 77, 80–81 (2004) (citing Maine v. Moulton, 474 U.S. 159, 170 (1985); United States v. Wade, 388 U.S. 218, 224 (1967)).

185. *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 358 (1977) ("Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel." (citing Mempa v. Rhay, 389 U.S. 128, 134–35 (1967); Specht v. Patterson, 386 U.S. 605 (1967))).

186. *See, e.g.*, Robinson v. Ignacio, 360 F.3d 1044, 1056 (9th Cir. 2004). Significantly, in discussing this rule, lower courts sometimes refer to those stages where the right to counsel applies at "'critical stages' *of the prosecution*," which includes sentencing. *Id.* (emphasis added).

Because the right to counsel and the right to confront adverse witnesses are structurally similar, both rights should be equally applicable in criminal prosecutions. Indeed, a very workable rule would be that the Confrontation Clause applies in those settings where the right to counsel attaches—"critical stages"—which certainly includes sentencing.[187] At least one judge has argued that in reality, the right to counsel is worthless without the right of confrontation since cross-examining witnesses is a specialty of attorneys.[188]

The best view, under the current criminal justice system, is to understand "prosecutions" as the *process* by which members of society are held accountable for their misdeeds, of which trial is just one phase. Unlike a trial, which ends with the jury verdict (or is obviated by a guilty plea), a prosecution ends only with the entry of the judgment.

Our approach toward plea agreements is consistent with this understanding. In a case where the defendant pleads guilty, there is clearly no trial, but we would not say in the absence of a trial that there was no prosecution. To the contrary, we would refer to the entire process of securing the criminal judgment as the prosecution. Indeed, where a defendant pleads guilty to one count in exchange for the government's promise to dismiss other counts, the government will typically not dismiss the other counts until after the defendant has been sentenced, confirming that until the defendant has been sentenced, the prosecution is not yet over.

2. *Original Understanding of the Term "Prosecution"*

This structural analysis is the best clue as to what the founders understood by the term "prosecution," but it is not the only clue. Scholars concerned with an original understanding of the term "prosecution" are likely to ask how the term was understood by the participants in the original constitutional debates, as demonstrated by their writings—such as the *Federalist Papers*[189]—or by the scholarly legal literature of the time—such as William Blackstone's *Commentaries on the Laws of England*, which was widely read and relied on by the founders.[190] The *Federalist Papers* do not define the term "prosecution," and the context in which the word is used would make sense referring either just to trial or to the entire process.[191]

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187. *See* United States v. Fatico, 441 F. Supp. 1285, 1288 (E.D.N.Y. 1977) (holding that the Confrontation Clause applies when hearsay "is offered by the government . . . at a critical stage of the criminal process").

188. States v. Petty, 982 F.2d 1365, 1371 (9th Cir. 1993) (Noonan, J., dissenting) ("What is the point of having counsel if counsel cannot exercise an essential function of counsel—the cross-examination of the witnesses against counsel's client?").

189. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed. 1997).

190. *See, e.g.*, Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 193 (1984).

191. The Federalist Papers frequently use the term in connection with the impeachment of federal

Blackstone is more helpful. An immediate observation is that the term "prosecution" has multiple meanings, one of which clearly seems to refer to the entire process of criminally punishing a member of society. Book Four of his *Commentaries* devotes a chapter to each of the twelve stages of this process, which he calls "the regular and ordinary method of proceeding in the courts of criminal jurisdiction."[192] The list of these twelve stages is immediately startling because it uses the term "prosecution" in a way we would not expect. The twelve stages are "1. Arrest; 2. Commitment and bail; 3. *Prosecution*; 4. Process; 5. Arraignment, and its incidents; 6. Plea, and issue; 7. Trial, and conviction; 8. Clergy; 9. Judgment, and its consequences; 10. Reversal of judgment; 11. Reprieve, or pardon; 12. Execution."[193]

It is surprising to see the term "prosecution" placed third because, if anything, it ought to replace "trial and conviction" in the list. Clearly, the meaning of "prosecution" as used in the third stage cannot be what the founders meant when they used the same term in the Sixth Amendment. This stage is described in Chapter 23, which is entitled "The Several Modes of Prosecution." Once a person has been arrested and committed or released, Chapter 23 explains that the "next step towards the punishment of offenders is their prosecution, *or the manner of their formal accusation.*"[194] This passage shows that the term "prosecution," as used as one of the stages of the criminal process, refers to the charging stage of the process. The Sixth Amendment would be nonsensical if we concluded it applied only at the charging stage of a criminal case.

Blackstone's other uses of the term, however, suggest a broader understanding. Earlier in the text, Blackstone uses the term "criminal prosecution" along with the term "civil suit,"[195] suggesting a meaning that includes the entire judicial process. In describing the twelve stages of the criminal process, he refers to them as "stage[s] of the prosecution,"[196] again suggesting that the term refers to the entire process. Most notable is the ninth "stage of criminal prosecution," which occurs "after trial and conviction are past, . . . which is that of *judgment*."[197] The use of the term "prosecution" in this context is important because it makes clear that Blackstone understood a "prosecution" to continue beyond trial.

More importantly though, it makes clear that "prosecution" includes sentencing. Although Blackstone never uses the term "sentencing" in his discussion of the criminal process, the stage that he calls "judgment" is clearly

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officers, stating that impeached officers could be subject to "prosecution and punishment in the ordinary course of law." *See* The Federalist Nos. 65, 69 (Alexander Hamilton); *see also id.* No. 77 (Alexander Hamilton).

192. BLACKSTONE, *supra* note 9, at 289.

193. *Id.* (emphasis added).

194. *Id.* at 298 (emphasis added).

195. *Id.* at 137.

196. *Id.* at 315, 317, 368.

197. *Id.* at 368.

the stage that we would label sentencing. For one thing, it falls chronologically right where sentencing falls under modern criminal procedure: between trial and appeal. Moreover, Blackstone's description of what happens at "judgment" is precisely what modern courts do at sentencing. Assuming that the defendant had no legal argument to prevent imposing a sentence, once he had been convicted, "the court must pronounce that judgment, which the law has annexed to the crime."[198] As discussed above, many of the sentences in Blackstone's day were determinate. But other sentences were indeterminate, and courts would exercise their discretion based on "the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances."[199] The fact that Blackstone described this process as one stage of a criminal prosecution supports the view that the founders understood "prosecutions" to include sentencing.

3. *Historical Application of the Confrontation Right*

In addition to these clues in writings contemporaneous to the founding of the country, another source for interpreting the Sixth Amendment is a historical view of how the right to confrontation was applied in criminal cases. In *Crawford*, the Court took such a historical approach to resolve the ambiguity in the phrase, "witnesses against," by citing cases from sixteenth century England to discern what concerns motivated the drafters to include this provision.[200] Similarly, the Court in *Williams* noted, "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."[201]

But *Williams'* historical analysis is unsupported. As for pre-founding courts, it is true that judges could sentence based on "the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances,"[202] but the *Williams* Court cites no authority to support the notion that pre-founding courts regularly relied on hearsay in exercising their discretion. As for post-founding practice, the fact that courts after the Constitution was ratified denied confrontation at sentencing does not enlighten us at all as to the founders' concerns when they adopted the Sixth Amendment. The only way post-ratification precedent is relevant is if it is specifically interpreting the Sixth Amendment, but *Williams* certainly did not do that, and I have explained above why the circuit courts' interpretations were flawed.

198. *Id.* at 369.
199. *Id.* at 371.
200. Crawford v. Washington, 541 U.S. 36, 42–50 (2004).
201. Williams v. New York, 337 U.S. 241, 246 (1948).
202. BLACKSTONE, *supra* note 9, at 378.

While a historical analysis demonstrates neither concern for, nor acceptance of, relying on hearsay at sentencing, the historical concerns that led to the Confrontation Clause are certainly implicated at sentencing and suggest that the founders would have found current sentencing practice to violate the Sixth Amendment. *Crawford* emphasizes that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[203] Using hearsay statements offered to aggravate a defendant's sentence, under any model of sentencing, seems to violate this purpose.[204]

In light of these observations, it should be clear that the Confrontation Clause applies at sentencing under the terms of the Sixth Amendment. The notion of "prosecution," as understood in the context of the Sixth Amendment and in legal writing contemporaneous to the founding of this country, includes sentencing, and structurally, the Confrontation Clause should apply with the same force as the right to counsel. While it is not clear that the use of hearsay was either a nagging concern or a widespread practice at the time of founding, the Supreme Court has identified those considerations that motivated adoption of the clause, and apply as much at sentencing as at trial.

B. The SRA Still Requires Confrontation at Sentencing

Should courts find this analysis inconclusive as to sentencing in general, it must be clear after *Booker* that the Confrontation Clause certainly applies at sentencings under the SRA.[205] However, it is not inconceivable that the judicial amendment to the SRA, which eliminated the jury requirement at sentencing, also eliminated any Confrontation Clause requirement. The district court in *Gray* took this approach:

> Arguments that sentencings under the Guidelines closely simulate trials so as to require the same procedural protections have been significantly undermined by the *Booker* remedy that makes the Guidelines advisory. Under the advisory system, the factual findings that I make at sentencing no longer mandate a defendant's punishment with mathematical precision. In the absence of such mandatory, fact-driven penalty determinations, arguments for constitutional procedural protections at

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203. *Crawford*, 541 U.S. at 50.

204. Citing the same English cases that would later form the basis for *Crawford's* historical analysis, Judge Arnold writes that "[w]hat we do know [about the founders' intent] . . . points towards recognizing the right of confrontation." United States v. Wise, 976 F.2d 393, 407 (8th Cir. 1992) (en banc), *rev'g* United States v. Fortier, 911 F.2d 100 (8th Cir. 1990) (Arnold, C.J., dissenting).

205. *See supra* Part II.C.

> sentencing are weakened. Accordingly, I cannot find that I am required to apply *Crawford* at sentencing.[206]

Thus, while *Booker* makes clear that the SRA as originally enacted required Sixth Amendment protections, the *Booker* remedy obviated the need to apply the Confrontation Clause at sentencing (a subtle reminder that the Supreme Court giveth, and the Supreme Court taketh away).

This analysis, however, ignores the reality that federal sentencing has not changed much since *Booker*. As noted above, the only modification was to strike two provisions that made the Guidelines mandatory. Other than this revision, all other substantive provisions and procedural rules were left in place. As a result, sentencing in the wake of *Booker* has proceeded pretty much as before. Probation officers still conduct presentence investigations and file their reports with the court. Parties still object to the reports, both on factual and legal grounds. Courts and parties still bicker over the meaning of the Guidelines in an adversarial proceeding.

But, while the *imposition* of the Guidelines is no longer mandatory, the *application* of the Guidelines is. Courts must still calculate the applicable range[207] and resolve all factual disputes that are relevant to the guideline calculation.[208] As a result, some district courts have gone so far as to say that they will only impose a non-guideline sentence "in unusual cases for clearly identified and persuasive reasons."[209] Following suit, the circuits have concluded that guideline sentences are presumptively reasonable,[210] and every circuit to speak on the issue has stated that it will continue to review guideline calculations as before.[211]

In light of the Court's interpretation of what the Confrontation Clause was intended to protect, it can hardly be said that *Booker* eliminated the need to afford confrontation rights at sentencing. As noted above, "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[212] This evil, most certainly, can arise at sentencing post-*Booker* in the same way as before: by using *ex parte* examinations against the accused. The only impact of *Booker* is that the effect of such evidence on the sentence imposed is not as measurably foreseeable as before because now the judge has the discretion to disregard the ultimate guideline calculation if he chooses. However, the judge does not have the discretion to misapply the guidelines, so if the evidence is admitted, it will be incorporated into the guideline calculation. While

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206. United States v. Gray, 362 F. Supp. 2d 711, 725 (S.D. W. Va. 2005).

207. United States v. Booker, 543 U.S. 220, 264 (2005).

208. FED. R. CRIM. P. 32(i)(3)(B); 18 U.S.C.A § 32(i)(3)(B) (West Supp. 2005).

209. *See, e.g.*, United States v. Wilson, 350 F. Supp. 2d 910, 925 (D. Utah 2005).

210. *See, e.g.*, United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005).

211. *See supra* note 109 and accompanying text.

212. Crawford v. Washington, 541 U.S. 36, 50 (2004).

the judge does not have to sentence within the Guidelines range, he is obligated to *consider* that range in sentencing. Because sentencing continues to be guideline centered, it follows that an increase in that range will naturally aggravate the sentence ultimately imposed.

Perhaps the problem with the SRA and the Guidelines is that they call for evidence of specific facts that lend themselves to proof by testimonial hearsay. In particular, "offense characteristics" call for details about the defendant's conduct that may extend far beyond the scope of the indictment. Proof of these facts will be gathered through typical law enforcement investigations and presented through the prosecutor to the probation officer for use in the presentence report. Because these facts are so integral to the sentencing process, it does not make sense to say that they are immune from constitutional protections simply because Congress left them as "sentencing facts" rather than elements. Congress gave them relevance and supreme importance at sentencing through the SRA. Defendants should have the right to test their trustworthiness in the crucible of cross-examination.

Thus, even if the Confrontation Clause does not compel its application at all sentencing hearings, it certainly requires as much at federal sentencing hearings, even under the revised SRA.

C. District Courts Should Apply Crawford *as a Matter of Discretion*

Should courts decide that the Confrontation Clause does not apply as a matter of law, sentencing courts should nevertheless require confrontation as a matter of discretion. The *Gray* court suggested this approach for "hotly contested issues:"

> In cases involving genuine disputes, my calculation of the advisory Guideline range requires that I must first consider the available evidence to resolve factual disputes and objections to the presentence report. The adversarial system provides the best method of establishing the reliability of testimonial evidence and the appropriate weight to assign to such evidence. Accordingly, I strongly encourage the use of witness testimony and cross-examination to resolve factual disputes at sentencing, notwithstanding my finding that *Crawford* does not apply at sentencing under the post-*Booker* sentencing regime.[213]

Unfortunately, it is unclear what the court means by "hotly contested issues," and the opinion is silent as to the basis for the defendant's Confrontation Clause challenge. Likely, the defendant was simply objecting to the general use of a PSR that probably relied on information gathered from acquaintances and relatives. This language suggests that the court would have required confrontation had the

213. United States v. Gray, 362 F. Supp. 2d 711, 725 (S.D. W. Va. 2005).

evidence been dispositive of a factual dispute under the Guidelines.

In any event, *Gray* acknowledges the inherent authority that sentencing judges have to hear and weigh evidence at sentencing. It is within a judge's discretion as factfinder to reject unfounded evidence. For all of the reasons stated above, sentencing judges can and should require confrontation as a matter of discretion, especially where the hearsay is offered to prove an enhancement under the Guidelines.

V. APPLYING *CRAWFORD* AT SENTENCING

The foregoing establishes that the Confrontation Clause applies at sentencing under the SRA, but what does this mean? The *Williams* Court was concerned that "most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination."[214] Another court refused to apply the Confrontation Clause, reasoning, in part, that "[t]he type and extent of this information [contained in presentence reports] make *totally impractical* if not impossible open court testimony with *cross-examination.* Such a procedure could *endlessly delay criminal administration* in a retrial of collateral issues."[215] Two observations suggest these concerns may be unfounded: (1) *Crawford* does not bar all hearsay; and (2) under the SRA, the court must hear testimony on the evidence anyway, so requiring confrontation will be a small burden on the courts.

A. *Sentencing and Testimonial Hearsay*

After *Crawford*, the Confrontation Clause does not exclude all hearsay, and since the Federal Rules of Evidence do not apply at sentencing, hearsay would be admissible as long as it was not "testimonial."[216] Thus, the practical implications turn on how courts define "testimonial hearsay." Although the Supreme Court declined to "spell out a comprehensive definition of 'testimonial,'"[217] it did identify a number of situations that would be testimonial: "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[218] The Court also suggested other possible definitions. For example, it cited the defendant's suggestion that it include "*ex parte* in-court testimony or its functional equivalent," which he defined as "affidavits, custodial examinations,

214. Williams v. New York, 337 U.S. 241, 250 (1948).

215. United States v. Silverman, 976 F.2d 1502, 1508 (6th Cir. 1992) (quoting *Williams*, 337 U.S. at 250).

216. *See Crawford*, 541 U.S. at 68.

217. *Id.*

218. *Id.*

prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."[219] The Court also noted a proposal suggested years earlier in a concurrence by Justice Thomas: "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[220]

Since *Crawford*, courts and critics have further defined "testimonial." The Tenth Circuit recently concluded, "the 'common nucleus' present in the formulations which the Court considered centers on the reasonable expectations of the declarant. It is the reasonable expectation that a statement may be later used at trial that distinguishes the flippant remark, proffered to a casual acquaintance, from the true testimonial statement."[221] Other circuits have taken a similar approach.[222]

Because *Crawford* applies only to "testimonial" hearsay, it does not impact pre-*Crawford* standards of admissibility for non-testimonial hearsay.[223] Once the defendant is convicted, information gathered by a probation officer about a defendant's background is probably not testimonial and could be admitted via the probation officer or the PSR. On the other hand, information about the underlying conduct, which typically would be gathered by law enforcement officers, would be testimonial and subject to confrontation rights.[224]

B. Need to Offer Evidence at a Sentencing Hearing

Of course, defendants are likely to challenge the most damaging testimony under the Confrontation Clause, and it is understandable that courts would not want to open the door to one more challenge that will consume judicial resources. However, the reality of federal sentencing is that once a defendant objects to an

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219. *Id.* at 51.

220. *Id.* at 51-52 (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment)).

221. United States v. Summers, 414 F.3d 1287, 1302 (10th Cir. 2005) (citation omitted).

222. *See, e.g.*, United States v. Hendricks, 395 F.3d 173, 181 (3d Cir. 2005) (holding that declarants' statements were not testimonial where they did not make them in the belief that they might later be used at trial); United States v. Saget, 377 F.3d 223, 228 (2d Cir. 2004) ("Crawford at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at trial."); United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004) ("The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.").

223. *Crawford*, 541 U.S. at 68 (granting states flexibility to develop hearsay rules for "nontestimonial hearsay").

224. *See* Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 288 (2005) (arguing that "the distinction between, and distinctive nature of, offense conduct and offender characteristics can and should directly inform the consideration of sentencing purposes and procedures").

allegation in a presentence report, the court must resolve that objection after a hearing on the issue.[225] Thus, the court will have to hear testimony from either the probation officer who read the police report of the witness statement, the police who took the statement, or the witness who made the statement. While the third option may take a little longer—because the government attorney will have to lay a foundation and set the stage—the first option does not eliminate the need to convene a hearing or hear the evidence.

Two cases illustrate this point. In *United States v. Luciano*,[226] a police officer testified at sentencing that he had been told by a witness that the defendant assaulted both the witness and the defendant's girlfriend with a gun. Although the witness did not testify at trial, he testified before the grand jury. As a result of this testimony, the defendant received a four-level enhancement based on the fact that he had used the gun in connection with an assault with a deadly weapon. Another example is *United States v. Martinez*,[227] where an officer testified at sentencing that witnesses claimed they had been in a fight with the defendant. In both these cases, the testimony took up the court's time at a hearing; in both cases, the government could have offered the testimony of the actual witness rather than the testimony of an officer who lacked personal knowledge of the facts he was testifying about.

On the other hand, requiring confrontation at sentencing allows courts to impose sentences based on accurate information. Although courts have always been concerned about reliability, cross-examination protects the truth seeking process. In fact, Professor Wigmore called cross-examination "the greatest legal engine ever invented for the discovery of truth."[228] Moreover, the social cost is also small, since we are not talking about letting a guilty man go free; rather, we are talking about how much prison time a convict should get.

To be sure, this rule will require the government to call in witnesses whose testimony could otherwise be offered through a probation officer or case agent. And, there may be policy reasons why the government would prefer not to have to call these witnesses. For example, confidential informants do not want to have their identities disclosed. Also, victims may desire not to have to face their wrongdoers again. Even citizen witnesses may prefer not to be dragged into a judicial proceeding. In exchange for the risk they face for testifying, confidential informants often benefit from their testimony, and United States Attorney's offices typically have victim witness coordinators whose job is to help victims through the judicial process. While this rule will make the government work harder to ensure it has witnesses prepared for sentencing, this burden is no different than what it routinely deals with throughout the prosecution process. In reality, this burden is slight compared to the benefit that cross-examination will bring to the criminal

225. FED. R. CRIM. P. 32(i)(2), (3)(B).

226. 414 F.3d 174, 176 (1st Cir. 2005).

227. 413 F.3d 239, 241 (2d Cir. 2005).

228. 5 WIGMORE, *supra* note 1.

justice system. One scholar sums it up like this:

> Still, in many cases, applying *Crawford's* confrontation principles at capital sentencing need not limit the information available to a sentencer. Where a hearsay declarant is available to testify, *Crawford* merely requires the government to present that information in a different, albeit less convenient, form: through the live testimony of the witness with direct knowledge of the facts. And when the witness testifies, the Confrontation Clause becomes a rule of inclusion rather than exclusion, guaranteeing the right to develop further information on cross-examination. Thus, the result of confrontation at capital sentencing may be more, not less, information. The cost may be no more than time and inconvenience. The benefit is preserving a defendant's right to test government evidence.[229]

VI. CONCLUSION

In short, the Confrontation Clause "is worth the cost." As Eighth Circuit Chief Judge Arnold observed, "[i]t is, after all, not a 'technicality' serving some extraneous purpose . . . . It bears directly on and significantly advances the truth-seeking function of sentencing hearings."[230] Requiring the government to prove disputed facts with live witnesses ensures that courts can carefully scrutinize the basis for the sentence they will impose. The consequences of aggravating facts at sentencing—even after *Booker's* remedy of making the Guidelines advisory—are very severe for defendants. Rather than mechanically applying old cases, courts should carefully consider the various reasons why their precedents were misguided. Most notably, this will be because of their failure to engage the Sixth Amendment and their error as to the import of the SRA. Courts should now recognize that the text of the Sixth Amendment requires confrontation at all stages of prosecution, including sentencing, and that *Booker's* remedy has not resolved the procedural concerns that require application of the Confrontation Clause under the SRA. For these reasons, courts should conclude that *Crawford* does apply at sentencing and give defendants at sentencing the protections described therein.

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229. John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 2027 (2005).

230. United States v. Wise, 976 F.2d 393, 412 (8th Cir. 1992) (Arnold, J., dissenting).

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